

# In the Supreme Court of the United States

OCTOBER TERM, 1953

---

No. 224

CIVIL AERONAUTICS BOARD, PETITIONER

*v.*

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF  
THE UNITED STATES; THE UNITED STATES OF  
AMERICA ON BEHALF OF THE POSTMASTER GEN-  
ERAL; AND WESTERN AIR LINES, INC.

---

No. 225

WESTERN AIR LINES, INC., PETITIONER

*v.*

CIVIL AERONAUTICS BOARD, ARTHUR E. SUMMER-  
FIELD, POSTMASTER GENERAL OF THE UNITED  
STATES, AND THE UNITED STATES OF AMERICA, ON  
BEHALF OF THE POSTMASTER GENERAL

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE DIS-  
TRICT OF COLUMBIA CIRCUIT*

---

**MEMORANDUM FOR THE POSTMASTER GENERAL AND  
THE UNITED STATES OF AMERICA**

---

The principal issue raised in these petitions is  
whether Section 406 (b) of the Civil Aeronautics

(1)

Act of 1938, 52 Stat. 998, 49 U.S.C. 486, requires the Civil Aeronautics Board, in fixing an air carrier's subsidy mail pay, to offset *all* of the carrier's other revenue, or whether, as the Board held, it may in its discretion refuse to offset some portion of such revenue.<sup>1</sup> The Board, in fixing petitioner Western Air Lines' subsidy for the period 1944 to 1948, refused to offset a \$447,000 profit made by the carrier on the sale of one of its routes in 1947. The Board did so on the ground that Western should be permitted to "retain" this profit in order to encourage voluntary route transfers by other carriers (R. 263-264). The court of appeals unanimously reversed the Board on that issue. The court held that Section 406 (b) restricts subsidy payments "to the need of each individual carrier," and does not authorize the Board to use subsidy payments "to provide incentives [for route transfers] to the industry generally" (R. 349-350).

We believe that the court of appeals correctly held that the Board erred in failing to offset the \$447,000 profit in fixing the carrier's subsidy need.<sup>2</sup>

---

<sup>1</sup> Section 406(b) directs the Board, in determining a carrier's subsidy need, to "take into consideration \* \* \* the need of each such air carrier for compensation \* \* \* sufficient \* \* \* *together with all other revenue of the air carrier*, to enable such air carrier \* \* \* to maintain and continue the development \* \* \*" of a national air transportation system [emphasis added].

Petitioner in No. 225 raises the further question (Pet. 12) whether the "other revenue" referred to in this Section is limited to revenue derived from the transportation of persons and property, or whether, as the Board held, it embraces the broader category of all income derived from air carrier functions.

<sup>2</sup> We note that petitioners erroneously state the issue when they refer to Western's "retaining" the profit on the sale (*e.g.*,

However, since we recognize that the basic statutory question involved—whether the Board can refuse to offset portions of a carrier's other revenue in determining subsidy—is of public importance, we do not oppose the petitions.<sup>3</sup> If the petitions are granted we intend to support the decision below not only for the reasons stated by the court, but on the broader ground that under the Act the Board cannot award subsidy in excess of a carrier's need, and that in determining such need the Board is required to offset *all*—and not just a part—of the carrier's other revenue.

Respectfully submitted,

ROBERT L. STERN,  
*Acting Solicitor General.*

AUGUST, 1953.

---

Pet. No. 224, 10, 12; Pet. No. 225, 11, 13). Clearly, no portion of the profit is "taken away" when subsidy is awarded; the only issue is how much *additional* money the carrier is to receive from the public treasury.

<sup>3</sup> We wish to point out, however, that pursuant to Reorganization Plan No. 10 of 1953, 18 Fed. Reg. 4543, subsidy payments for services rendered after October 1, 1953, will be made by the Board, and not by the Postmaster General. Thereafter, the Postmaster General will make only payments covering compensation for the carriage of mail.